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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1958

No. 486

EDWARD WILLIAM CURD,
Petitioner,

v.

UNITED STATES OF AMERICA, and LAURIE W. TOMLINSON, Director of Internal Revenue of the United States for the Collection District of Florida,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LLEWELLYN A. LUCE,
937 Munsey Building,
Washington 4, D. C.
Counsel for Petitioner.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 30, 1958 (App. *infra*, p. 27, R. 104), based on an opinion of said Court promulgated June 30, 1958 (App., *infra*, p. 20, R. 95), reversing the final decree and judgment of the United States District Court for the Southern District of Florida entered on July 11, 1957 (App. *infra*, p. 30, R. 21). Said judgment of the Court of Appeals became a final judgment of that Court on August 6, 1958 when the Court denied the petition for rehearing filed on July 18, 1958 by this petitioner (R. 105, App., *infra*, p. 28).

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court are reported in 1 AFTR 2d 678 and may be found in the Appendix, *infra*, p. 28 (R. 91-2).

The opinion of the Court of Appeals, promulgated June 30, 1958 (App., *infra*, p. 20, R. 95), reversing the judgment and decree of the District Court entered July 11, 1957 is reported in 2 AFTR 5111.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit (App., *infra*, p. 20, R. 95) was promulgated June 30, 1958. The judgment of the Court of Appeals was entered June 30, 1958 (App., *infra*, p. 27, R. 104).

On July 18th, 1958, petitioner filed with the Court below a petition for rehearing. On August 6, 1958, the Court below entered its order denying the petition for rehearing (R. 112; App., *infra*, p. 28).

The judgment of the Court below did not become final, so that certiorari could be sought as to the same, until August 6, 1958 when the United States Court of Appeals for the Fifth Circuit denied petitioner's motion for rehearing. *United States* v. *Ellicott*, 223 U.S. 524, 32 S. Ct. 334; *United States* v. *Cresent Amusement Co.*, 323 U.S. 173, 65 S. Ct. 254; *Kingman & Co.* v. *Western Mfg. Co.*, 170 U.S. 675, 680, 681, 18 S. Ct. 786.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the Court below erred by reversing the judgment and decree of the District Court and in failing to hold and decide that, under Sections 276(c) and 272(a)

of the 1939 Internal Revenue Code the District Court correctly decided that the respondents should be permanently enjoined from selling and disposing of the petitioner's property for the purpose of collecting 1942 income taxes assessed against him during April of 1943 and again assessed, plus ten years interest thereon, during May of 1953.

2. Whether the Court below erred in failing to hold and decide that the collection of the $13,390.51, 1942 income taxes, assessed against petitioner by the Commissioner of Internal Revenue in April of 1943 was barred after April of 1949 and that the collection proceedings begun by respondents during 1954 were specifically prohibited by Section 276(c) of the 1939 Internal Revenue Code.

3. Whether the Court of Appeals erred by holding and deciding that the assessment on May 29, 1953 by the Commissioner of Internal Revenue against the petitioner of $13,390.51 income taxes for the year 1942, plus interest thereon of $8,235.16, was not the assessment of a "deficiency" within the meaning of Section 272(a) of the 1939 Internal Revenue Code.

4. Whether the Court below erred by failing to hold and decide that the respondents' proceedings for the collection of the assessment of income taxes made against petitioner in May of 1953 in the amount of $13,390.51, plus $8,235.16 interest, were prohibited and subject to injunctive relief under the specific provisions of Section 272(a)(1) of the 1939 Internal Revenue Code because the Commissioner failed to issue to petitioner a ninety day notice of the 1942 deficiency in taxes assessed on May 29, 1953 as required by said Section 272(a)(1).

STATUTES INVOLVED

The pertinent statutory provisions involved, Sections 271, 272, 276, 3653 and 3746 of the Internal Revenue Code

of 1939 and Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, Sec. 6, are set forth in the Appendix, *infra*, pp. 31-35.

STATEMENT OF THE CASE

On or about March 15, 1943, the petitioner (taxpayer) filed with the United States Collector of Internal Revenue for the District of Kentucky, his Federal income tax return for the year 1942. On this return he reported income tax due in the amount of $26,781.03. These taxes were assessed by the Commissioner of Internal Revenue on the Commissioner's April, 1943 assessment list. Payments of $13,390.52 were made by the taxpayer on this liability in two equal installments in 1943. The unpaid balance of $13,390.51 was recorded on the books of the Collector as discharged, pursuant to the provisions of the Current Tax Payment Act of 1943, Section 6, and the amount previously paid on the 1942 assessment was credited to the petitioner's 1943 income tax liability in accordance with the aforesaid Section 6 (App. *infra*, p. 21).

In 1953 the Commissioner determined that the petitioner was not entitled to the so-called forgiveness provisions of Section 6 of the 1943 Current Tax Payment Act because of alleged fraud in the filing of the 1942 tax return. On May 29, 1953, the Commissioner reassessed the unpaid balance of the 1942 tax, $13,390.51, plus interest from April of 1943 to April of 1953 in the amount of $8,235.16 (App. *infra*, p. 22).

The Commissioner did not issue a notice of deficiency under Section 272(a)(1) with respect to the 1942 taxes in the amount of $13,390.51, plus interest of $8,235.16 assessed on May 29, 1953 (App. *infra*, p. 22).

During the year 1952 the Commissioner had issued a notice of deficiency proposing some additional taxes and

penalties for the years 1941 through 1951. These additional taxes and penalties, plus interest, in the approximate amount of $260,000 were paid by the petitioner on July 31, 1952. Thereafter the petitioner went to Canada where he continues to live. In the meantime, he was indicted for tax evasion for some of the years. There was no indictment for the year 1942 (App. *infra*, p. 21).

In 1954, proceedings for the collection of the 1942 tax of $13,390.51, plus interest of $8,235.16, assessed on May 29, 1953 was begun by the Commissioner. The assessment records were transferred to the Director of Internal Revenue, Florida District at Jacksonville. This District Director distrained on petitioner's property at Miami Beach, Florida and advertised it for sale (App. *infra*, p. 22).

The petitioner then filed with the United States District Court for the Southern District of Florida a petition for an injunction to enjoin the respondents from selling the petitioner's real and personal property at Miami Beach, Florida for the purpose of collecting 1942 tax and interest.

The District Court, on July 11, 1957, granted the injunction prayed for by the petitioner (App. *infra*, p. 29, R. 92), stating in part as follows:

> "1. The Court had jurisdiction of the parties and the subject matter herein.
>
> "2. The reassessment of the 1942 tax in the year 1953 was of the same amount as that tax originally assessed against petitioner during the year 1942. There was no showing before the Court that this original assessment was the result of fraud with intent to evade tax on the part of petitioner. In the absence of such fraud, under the provisions of 26 U.S.C. § 276 (1939), collection of an income tax imposed may be made only if begun within six years after the assessment of the tax. Therefore, more than six years having elapsed, respondent should be

and is enjoined from collection of that portion of the claim asserted against the petitioner for the 1942 tax."

The respondents herein appealed to the United States Court of Appeals for the Fifth Circuit. On June 30, 1958, the Court of Appeals entered an opinion and judgment reversing the judgment and decree of the District Court and remanding the case, with directions to vacate the injunction (App. *infra*, pp. 20-27).

On the 18th day of July, 1958, the petitioner filed with the Court below a petition for rehearing. On August 6, 1958, the Court of Appeals denied petitioner's motion for rehearing (App. *infra*, p. 28, R. 112).

The petitioner now prays that a writ of certiorari be issued by this Honorable Court to review the aforesaid judgment of the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

I

The collection of the $13,390.51 additional 1942 tax assessed in April, 1943, was specifically barred by Section 276(c) of the 1939 Internal Revenue Code in April of 1949. Therefore the respondent's distraint and proceedings in court during 1953 and subsequent years to collect that sum of $13,390.51, plus ten years interest thereon of $8,235.16, was clearly without any color of right or semblance of legality.

Section 276(c) of the 1939 Internal Revenue Code (App. *infra*, p. 31) clearly and specifically provides that income taxes assessed within the applicable period of limitations may be collected by distraint or by a proceeding in court, *but only if begun within six years after the assessment of the tax.*

The original assessment of the 1942 taxes against petitioner was made in April of 1943. Therefore, under Section 276(c) of the Code, collection and proceedings in court for collection were barred after April of 1949. The proceedings in court were instituted by the respondents in February, 1954 (p. 42, App. B, Appellants' Brief in Court below) and the petition for injunction was filed March 5, 1954, (p. 48, App. B, Appellants' Brief in Court below) approximately five years after proceedings for collection were barred by Section 276(c). In other words, the United States did not institute proceedings for collection until eleven years after the tax was originally assessed and the reassessment of the 1942 taxes by the Commissioner was not made until May 29, 1953, ten years after the original assessment.

This Court, in *United States* v. *Updike*, 281 U.S. 489, 50 S. Ct. 367, 74 L. Ed. 984, has made it plain that the six-year statute of limitations on the collection of *an assessed tax* means exactly what Congress stated therein, namely, that such *assessed tax* is extinguished and barred if not collected within six years after the assessment thereof. In the course of its opinion this Court stated:

• • • •

> "• • • An actual assessment having been made, it must be assumed that the government was in possession of the facts which gave rise to the liability upon which the assessment was predicated. In such case to allow an indefinite time for proceeding to collect the tax would be out of harmony with the obvious policy of the act to promote repose by fixing a definite period after assessment within which suits and proceedings for the collection of taxes must be brought."

• • • • • •

In the light of the express terms of Section 276(c) as enacted by Congress and this Court's opinion in *United States* v. *Updike, supra*, it is clear that the Commissioner of Internal Revenue's efforts in 1954 and subsequent years

to exact and collect the $13,390.51 of money here in controversy from petitioner is without any semblance of legality or color of right.

In reversing the District Court, the Court of Appeals failed to follow the decision of this Court in *United States* v. *Updike, supra,* and ignored the specific provisions of Section 276(c) of the 1939 Internal Revenue Code, providing that an assessed tax may be collected by distraint or a proceeding in court *but only if begun within six years* after the assessment of the tax. *There is no statutory provision for extending the time for instituting collection proceedings on account of fraud, either charged or proved.*

Respondents concede that in this case there was no agreement between the parties for an extension of the period for distraint or the bringing of proceedings in court.

The Court below stated (App. *infra,* p. 25): "That a tax may be barred under applicable statute is not of itself a sufficient showing" for an injunction. Here, however, distraint and proceedings in court for collection were *prohibited* by Section 276(c) of the Internal Revenue Code.

Moreover, the respondents waited for eleven years (1943 to 1954) before bringing distraint or collection proceedings with respect to the tax assessed in April of 1943. In the meantime $8,235.16 of interest had, according to respondents, accumulated and this interest they sought also to collect by distraint. If the injunction is not granted, the taxpayer must submit to the sale of his real and personal property and then seek to recover the tax and accumulated interest by further litigation.

At the hearing before the District Court, the District Judge inquired (R. 33-37) as to the legal right of the

respondents to collect a tax ten years after the assessment. The answer is that the Commissioner of Internal Revenue does not have, and has never had, the right to assess again or "reassess" after the expiration of the six-year statute of limitations period for collection provided in Section 276(c) with respect to an assessed tax not collected within such six-year period. Obviously, any such alleged right would render the statute of limitations as to collection proceedings a nullity and enable the Commissioner to "reassess" at any time during a taxpayer's lifetime or against his estate after the taxpayer's death. Respondents cannot extend the statute of limitations for collection proceedings by the expedient of reassessment after the time or date when collection proceedings are barred and prohibited.

We think that all of these unusual and particular factors bring this case within the "exceptional circumstances" referred to by this Court in *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, 52 S. Ct. 260, 76 L. Ed. 422, which the court below did not follow.

The Court below was clearly authorized to grant injunctive relief and it was required to do so under the facts and law controlling in this case. *Miller* v. *Standard Nut Margarine Co., supra; United States* v. *Updike, supra.*

In *National Foundry Co. of New York* v. *Director of Internal Revenue*, 229 F. 2d 149, 48 AFTR 853 (CA 2, 1956) the Court of Appeals concisely stated the rule applicable here as follows:

> "The main basis for the decision below and for the appellee's argument for a differentiation of the claims he presses from those of the City and State of New York is the well-known statute, now I.R.C. § 7421, 26 U.S.C., which provides—within certain exceptions not here applicable for pending or potential Tax Court matters—that 'no suit for the purpose of restraining the assessment or collection of any tax shall be

> maintained in any court.' But it has long been settled that this general prohibition is subject to exception in the case of an individual taxpayer against a particular collector where the tax is clearly illegal or other special circumstances of an unusual character make an appeal to equitable remedies appropriate. See, for example, Miller v. Standard Nut Margarine Co. of Florida, 284 U.S. 498, 52 S. Ct. 260, 76 L. Ed. 422; Shelton v. Gill, 4 Cir., 202 F. 2d 503; Holland v. Nix, 5 Cir., 214 F. 2d 317, 320."

We respectfully urge that the decision of the Court of Appeals is in conflict with the decision of the United States Court of Appeals for the Second Circuit in *National Foundry Co. of New York* v. *Director of Internal Revenue, supra.*

The case at bar is that of an individual taxpayer against a particular collector or director where the collection proceedings with respect to the proposed 1942 tax and long accumulated interest were specifically prohibited by Section 276(c). The circumstances of this case, we think, are certainly special, unusual and exceptional, which make the petition for injunction appropriate as granted by the District Court.

II

The proceedings in the District Court for collection of the 1942 additional taxes, plus interest, here involved, were invalid, improper and illegal because the Commissioner of Internal Revenue did not issue any ninety day deficiency letter to the taxpayer with respect to the assessment of May 29, 1953, as required by Section 272(a) of the 1939 Internal Revenue Code (App. *infra*, p. 24).

The Court below admitted that the injunction granted by the District Court was proper under Section 272(a) of the 1939 Internal Revenue Code if the assessment of May 29, 1953 was the assessment of a "deficiency". The

Court inadvertently referred to the assessment as having been made in 1952 rather than in 1953 (App., *infra*, p. 24). The Court held, however, that the May 29, 1953 assessment was not an assessment of a "deficiency" within the meaning of Section 272(a) (App. *infra*, p. 24).

The Court of Appeals ruled that the assessment of May 29, 1953 was based on acceptance of the 1942 return of the taxpayer as made (App., *infra*, p. 24) and accordingly the 1953 assessment was not a "deficiency" assessment.

With the utmost respect for the learned Court below, petitioner submits that the Commissioner did not accept the 1942 return as made. On the contrary the Commissioner charged that the return was false and fraudulent and for that reason made the assessment of May 29, 1953 in the amount of $13,390.51 1942 taxes, plus ten years interest of $8,235.16.

The following findings of fact by the Court below show exactly what happened in this case:

* * * *

"By March 15, 1943, Taxpayer filed his individual income tax return with the Collector in Kentucky reporting income tax due for the year 1942 in the sum of $26,781.03. *This was assessed on the Commissioner's list in April 1943.* Payments by Taxpayer aggregating $13,390.52 were made on this reported liability in two equal installments in 1943. The unpaid balance of $13,390.51 was recorded on the books of the District Collector as discharged pursuant to the provisions of the pay-as-you-go 1943 Act, Section 6, and the amount previously paid on the 1942 assessment was credited to Taxpayer's 1943 income tax liability in accordance with that section. (Italics ours) (App., *infra*, p. 20-21).

* * * *

"Apparently treating the payment in 1952 of these sums for 1942 as a determination that fraud had

occurred, the Commissioner determined that Taxpayer was not entitled for the year 1942 to the benefit of the so-called forgiveness provisions of Section 6 of the 1943 Act, and on May 29, 1953, he reassessed the unpaid balance of tax ($13,390.51) shown on the Taxpayer's 1942 return, plus interest thereon to April 1953 in the amount of $8,235.16. * * *" (App., *infra*, p. 22).

Thus it is clear that the Commissioner did not accept the petitioners 1942 return as made.

The Court then held that the May 29, 1953 assessment was not the assessment of a "deficiency" within the meaning of Section 272(a)(1) and as defined by Section 271 of the 1939 Internal Revenue Code.

Section 271 (App., *infra*, p. 31) provides:

"SEC. 271. DEFINITION OF DEFICIENCY.

"(a) In general.—As used in this chapter in respect of a tax imposed by this chapter, 'deficiency' means the amount by which the tax imposed by this chapter exceeds the excess of—

"(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

"(2) the amount of rebates, as defined in subsection (b)(2), made."

Subsection (b) of Section 271 then defines rebates as follows:

"(2) The term 'rebate' means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by this chapter was less than the excess of the amount specified in subsection (a)(1) over the amount of rebates previously made; and

> "(3) The computation by the collector, pursuant to section 51(f), of the tax imposed by this chapter shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return."

We urge that the Court below overlooked the provisions of subsections (b)(2) and b(3) of Section 271.

Here, as found by the Court below, the Commissioner in 1943 discharged or "rebated" the $13,390.52 unpaid liability of petitioner for 1942 and then reassessed this amount, plus interest, on May 29, 1953 (App., *infra*, p. 21 and p. 22).

It appears well settled that the Commissioner may assess or determine a "deficiency" based on a "rebate" which the Commissioner considers erroneous.

In *Oilbelt Motor Co.* v. *Commissioner*, 16 B.T.A. 831, the Board of Tax Appeals, after citing cases, declared:

> • • • •
>
> "The term 'deficiency' is defined in section 273 of the Revenue Acts of 1924 and 1926 to be 'The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.'
>
> "It will be observed that the statute expressly recognizes that in arriving at the correct tax there may have been additional assessments, or collections, abatements, refunds, and credits clearly indicating that a refund, erroneous or otherwise, does not bar further action by the Commissioner.
>
> "In view of these decisions and statute we hold that the Commissioner has power at any time within

> the period of limitation to revise or change his findings unless a settlement has been made pursuant to section 3229 of the Revised Statutes, *and that in so doing he may determine a deficiency based upon an erroneous refund.*" (Italics ours.)
>
> • • • •

The Board of Tax Appeals had previously reached the same conclusion in *Austin Company* v. *Commissioner,* 8 B.T.A. 628. This decision was affirmed by the United States Court of Appeals for the Sixth Circuit, 35 F. 2d 910, in *Austin Company* v. *Commissioner.*

In *Levy et al.* v. *Commissioner,* 48 F.2d 1727, the United States Court of Appeals for the Ninth Circuit affirmed the Board of Tax Appeals (18 B.T.A. 337) in deciding that a deficiency may be based in part on an erroneous refund.

See also *First National Bank of Plattsburg* v. *Commissioner,* 4 B.T.A. 478. (Deficiency based on erroneous allowance of refund claim.)

The decision of the Court below is in conflict with the decisions of the Sixth Circuit in *Austin Company* v. *Commissioner, supra,* and the Ninth Circuit in *Levy et al.* v. *Commissioner, supra.*

Also, until the decision of the Court of Appeals in this case, it appeared well settled by the decisions of the Board of Tax Appeals that the reassessment of an erroneous rebate was a "deficiency" assessment over which the Board of Tax Appeals and its successor, the Tax Court of the United States, had jurisdiction.

In *Jamison, Director of Internal Revenue* v. *Maria Repetti,* 239 F. 2d 901 (September 7, 1956), the United States Court of Appeals for the Ninth Circuit sustained the decision of the District Court for the Northern District of California, 131 F. Supp. 626, in granting summary judgment for the taxpayer and issuing an injunction. In that case the taxpayer claimed as a credit toward payment of one year's taxes an overpayment made

in a prior year. The Commissioner made an assessment against the taxpayer equal to the amount of the overpayment for which the taxpayer had taken credit, but did not issue a deficiency notice. The District Court held that the assessment by the Commissioner was a deficiency assessment and that the taxpayer was entitled to an injunction under the provisions of Section 272(a) because the Commissioner, as in the instant case, had failed to issue a notice of deficiency.

The decision and reasoning of the Court below is in conflict with the decision of the Ninth Circuit in *Jamison, Director of Internal Revenue* v. *Maria Repetti, supra.*

In *Emily Marx* v. *Commissioner,* 13 T.C. 1099, the Tax Court concluded:

• • • •

"• • • It seems unreasonable to suppose that Congress, in enacting the forgiveness feature of the Current Tax Payment Act in section 6, intended thereby to exclude some of the tax liability of a taxpayer from the computation of a deficiency or from the computation of a rebate, the definitions of which include words 'imposed by this chapter.' Sec. 271. To hold otherwise would limit taxpayers' right to litigate in regard to the unforgiven portion of the 1942 tax included in the tax for 1943.

"The conclusion has been reached that all of the tax liability under section 6 of the Current Tax Payment Act of 1943 is tax imposed by chapter 1 for the purpose of the definition of a deficiency contained in section 271 of the code. • • •"

• • • •

No decision has disturbed this conclusion of the Tax Court except the decision of the Court below, concluding the assessment of May 29, 1953 was not a "deficiency" assessment.

The decision of the Court of Appeals in this case stands alone in holding that the assessment of an alleged errone-

ous rebate (refund or credit) is not a deficiency assessment within the meaning of Sections 272(a) and 271 of the 1939 Internal Revenue Code.

Moreover, even if the assessment of May 29, 1953 is to be regarded as a "penalty" assessment rather than the reassessment of an erroneous rebate, we submit that it was nevertheless an assessment of a "deficiency".

Respondents may urge that the "assessment" of the 1942 taxes forgiven and rebated in 1943 was in effect a penalty because subsection (b) of Section 6 of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126 (App. *infra*, p. 35) states that the forgiveness provisions as to 1942 shall not apply in case additions to the tax for 1942 are applicable by reason of fraud.

There has recently been substantial litigation on the question whether the assessment of a "penalty addition" to tax is the assessment of a "deficiency" as defined in Section 271. The question has not yet reached this Court for decision but it appears that under the present status of the decisions, a penalty assessment is a "deficiency" assessment.

A statutory notice from the Commissioner in which no additional income tax is determined, but advising the taxpayer that the fifty percent fraud penalty is due, is a notice upon which a proceeding in the Tax Court can be based. *Herbert Eck* v. *Commissioner*, 16 T.C. 611, affirmed (CA 2, 1953), 202 F. 2d 750, certiorari denied October 12, 1953, 346 U.S. 822.

A penalty for substantial underestimation of estimated tax was held to be a "deficiency" although the penalty was the sole basis for the deficiency notice. *Newsom* v. *Commissioner* (CA 5) 219 F. 2d 444, affirming 22 T.C. 225.

A delinquency penalty for late filing of a return is a "deficiency" under Section 272(a)(1) of the 1939 Internal Revenue Code. *Hackleman* v. *Granquist, District Di-*

rector (United States District Court of Oregon, January 7, 1957) 147 F. Supp. 826.

Please see also *Middleton* v. *Commissioner* (CA 5), 200 F. 2d 94; *Fides* v. *Commissioner of Internal Revenue*, 1942, 47 B.T.A. 280, affirmed 4 Cir., 137 F. 2d 731; *Ross* v. *Commissioner of Internal Revenue*, 1941, 44 B.T.A. 1; *Taylor Securities, Inc.* v. *Commissioner of Internal Revenue*, 1939, 40 B.T.A. 696; *Fidelity Bankers Trust Co.* v. *Commissioner of Internal Revenue*, 1928, 37 B.T.A. 142; *Pioneer Automobile Service Co.* v. *Commissioner of Internal Revenue*, 1937, 36 B.T.A. 213; *Blenheim Co.* v. *Commissioner of Internal Revenue*, 1940, 42 B.T.A. 1248, affirmed 4 Cir., 125 F. 2d 906; *Muse* v. *Enochs, District Director*, (August 26, 1958) 2 AFTR 2d 5617.

The reasoning and decision of the Court below, holding that the assessment of May 29, 1953 was not a "deficiency" assessment, is in conflict with and out of line with the foregoing decisions.

It is submitted that the Commissioner of Internal Revenue never gave the taxpayer an opportunity to defend himself against any charge of fraud in connection with the assessment of the $13,390.51 additional taxes for 1942, plus $8,235.16 interest assessed on May 29, 1953. No notice of deficiency was mailed to the taxpayer, with respect to this assessment, as required by Section 272(a) of the 1939 Internal Revenue Code. (R. 60-61).

Moreover, the District Court found that the respondents had made no showing of fraud with respect to the 1942 taxes (App., *infra*, p. 29, R. 92). The Court below merely by-passed this finding (App., *infra*, pp. 20-28). It did not and could not decide that this finding of the District Court was not based upon substantial evidence and thus reverse the District Court because, as found by the District Court, the respondents presented no evidence of fraud at the trial of the injunction case.

The burden of proof of fraud rested upon the respond-

ents. *Budd* v. *Commissioner* (CA 3), 43 F. 2d 509; *Kashat* v. *Commissioner* (CA 6), 229 F. 2d 282; *Valetti* v. *Commissioner* (CA 3, Oct. 17, 1958), 2 AFTR 2d 5914, holding that the payment of previous assessments and penalties is not sufficient evidence of fraud; *Arthur M. Godwin* v. *Commissioner*, 34 B.T.A. 485.

We think the following question is pertinent: if the assessment of May 29, 1953 was not the assessment of a "deficiency", what was it?

Respondents may claim that the proceedings in court for collection were in the nature of a suit to recover an erroneous rebate; that is, "discharge or refund of taxes". However, Section 3746 (App. *infra*, p. 33) prohibits proceedings for the recovery of an erroneous refund unless begun within two years after the making of the refund or five years if it appears that any part of the refund was induced by fraud.

The discharge of the taxes here involved was made by the Collector during 1943. In any event, an erroneous discharge could only have been recovered by suit brought prior to the year 1949, rather than in 1954, as here, following an additional assessment made on May 29, 1953.

Finally, we think that the reasoning and decision of the Court below is in conflict with the reasoning and decision of the United States Court of Claims in *Lyddon & Co.* v. *United States*, (March 5, 1958), 158 F. Supp. 951.

In that case the Commissioner made an assessment against the taxpayer but failed, as here, to issue a notice of deficiency under Section 272(a)(1). The taxpayer paid the tax, brought suit in the Court of Claims and moved for summary judgment on the ground that the assessment without a notice of deficiency was invalid. The Government, taking a position inconsistent with the position in is case, urged that the proper remedy was the filing of a petition for an injunction in the proper

district court under the provisions of Section 272(a)(1). The majority opinion of the Court of Claims sustained the position of the United States, stating in part as follows:

> "The Government urges that the plaintiff was, by section 272, given another avenue of relief just as good as resort to the Tax Court. It points out that, in the plaintiff's situation, it could have sought an injunction in a United States District Court. The plaintiff says that that would not have been an equivalent remedy because, to obtain an injunction, it would have had to give a bond to assure the Government against loss from the delay in collecting the tax. There is some merit in this contention. This court's decision in Lehigh Portland Cement Co. v. United States, 90 C. Cls. 36, tends to support the Government's position on the injunction question."

The minority opinion of the Court of Claims expressed the view that since no ninety-day letter was issued by the Commissioner, the assessment was entirely void and that the plaintiff's motion for summary judgment should have been granted.

It is respectfully urged that this case involves substantial questions of Federal tax law and that the issues should be decided and put to rest by this Honorable Court.

Conclusion

Wherefore, it is submitted that the writ of certiorari should be granted.

Respectfully submitted,

LLEWELLYN A. LUCE,
937 Munsey Building,
Washington 4, D. C.
Counsel for Petitioner.

APPENDIX

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 17002

United States of America, and Laurie W. Tomlinson, Director of Internal Revenue of the United States for the Collection District of Florida, appellants,

versus

Edward William Curd, appellee.

Appeal from the United States District Court for the Southern District of Florida.

(June 30, 1958.)

Before Rives, Cameron and Brown, *Circuit Judges.*

Brown, *Circuit Judge:* As this case comes to us, the single question, presented on an uncontradicted record, is whether the Court erred in granting an injunction against the sale of Taxpayer's house and lots in Miami Beach, Florida, under a warrant of distraint based on an assessment made on May 24, 1953, for taxes ($13,390.51) and interest ($8,235.16) assessed in 1943 for the tax year 1942 but provisionally forgiven under the 1943 Current Tax Payment Act, c. 120, 57 Stat. 126.

By March 15, 1943, Taxpayer filed his individual income tax return with the Collector in Kentucky reporting

income tax due for the year 1942 in the sum of $26,781.03. This was assessed on the Commissioner's list in April 1943. Payments by Taxpayer aggregating $13,390.52 were made on this reported liability in two equal installments in 1943. The unpaid balance of $13,390.51 was recorded on the books of the District Collector as discharged pursuant to the provisions of the pay-as-you-go 1943 Act, Section 6, and the amount previously paid on the 1942 assessment was credited to Taxpayer's 1943 income tax liability in accordance with that section.

In 1952 deficiencies were determined against the Taxpayer for all of the years from 1941 through 1951 and to which 50% fraud penalties were added under Section 293(b) of the 1939 Code. Although Taxpayer had received a Deficiency Notice, he did not dispute the Commissioner's determination. These additional taxes, together with penalties and interest, aggregating approximately $260,000 were paid within two days by Taxpayer on July 31, 1952, after which, so the Taxpayer's complaint tells us, he departed for Canada where he continues to live, and the Government meanwhile indicted him for income tax evasion for some of these years. Included within this large sum paid on July 31, 1952, were additional taxes, fraud penalty, and interest for the year 1942 amounting to $5,920.67, $2,960.34 and $3,329.20 respectively.

Apparently treating the payment in 1952 of these sums for 1942 as a determination that fraud had occurred, the Commissioner determined that Taxpayer was not entitled for the year 1942 to the benefit of the so-called forgiveness provisions[1] of Section 6 of the 1943 Act, and on

[1] Subsection (a) and (b) of Section 6 "Relief From Double Payments in 1943" conclude with identical language: "* * * This subsection shall not apply in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for

May 29, 1953, he reassessed the unpaid balance of tax ($13,390.51) shown on the Taxpayer's 1942 return, plus interest thereon to April 1953 in the amount of $8,235.16. This reassessment, together with others not now involved, was transferred to the District Director's office at Jacksonville where the distraint was issued, and the property advertised for sale.

The Taxpayer, by a complaint which specifically alleged only that there was a failure to mail the statutory registered Notice of Deficiency following the assessment of May 24, 1943, as required by Sections 272(a) and 273(a) of the 1939 Code, sought an injunction under the express terms of the Code.[2] Presumably by consent of the parties, FRCP 15(b), the issues were broadened and the Court, without ruling on the request for the statutory Section 272 injunction, granted the injunction on the specific ground that, fraud not having been proved in that proceeding, collection of the original assessment of 1942 was barred by the 6-year statute of limitation[3]

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the taxable year 1942 or in which additions to the tax for such taxable year are applicable by reason of fraud."

[2] Section 272(a): "* * * No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, not until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

[3] The pertinent limitations are:

"SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

"Except as provided in section 276—

"(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the

in Section 275, 276.

Engaging arguments are made pro and con on whether collection of the 1942 "forgiven" assessment was barred under Section 276(c), whether this was the equivalent of an effort to recapture an erroneous refund barred under Section 3746(b) and (c) of the 1939 Code, whether the proceedings were invalid for want of a 90-day deficiency notice under Section 272, and the like. In our disposition of the case, we reach only one of these, and that only insofar as it relates to the Section 272(a) statutory ground for injunction. This is so because we are of the clear opinion that this was not the case for equitable injunction forbidden generally by the express words of the Code.[4]

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collection of such taxes shall be begun after the expiration of such period.

* * * *

[26 U.S.C. 1952 ed., Sec. 275]

"SEC. 276. SAME—EXCEPTIONS.

"(a) *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * *

"(c) *Collection After Assessment.*—Where the assessment of any income tax imposed by this Chapter has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon." [26 U.S.C. 1952 ed., Sec. 276.]

[4] "SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION

"(a) *Tax.*—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or

Of course, if a Notice of Deficiency were required, then, since one was not given, injunction would issue on application under Section 272(a). *Maxwell* v. *Campbell*, 5 Cir., 205 F.2d 461. But without in anyway intimating anything which would have a bearing on the ultimate decision on the merits of this controversy, this 1952 assessment was not a "deficiency" within Section 272(a), 273(a)(b). Deficiency, as it is used in the statute, Section 271, 1939 Code, relates to the assertion of a claim for an *additional* tax as a part of the mechanism by which the Board of Tax Appeals, now the Tax Court, acquires jurisdiction, and thus affords taxpayers an alternative remedy to payment and suit for refund. See *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 721, 73 L.ed. 918; *Ventura Consolidated Oil Fields* v. *Rogan*, 9 Cir., 86 F.2d 149, cert. den. 300 U.S. 672, 81 L.ed. 878. Accordingly, the injunctive relief authorized by Section 272(a) is limited to "deficiency" assessments of which the Tax Court would have jurisdiction. See *Standard Oil Co.* v. *McMahon*, 2 Cir., 244 F.2d 11, affirming D.C.N.Y., 139 F.Supp. 690; 9 Mertens Law of Federal Income Taxation, §§49.10-49.13 (1943).

What is asserted here is not an *additional* tax. That sought to be collected is the very tax which Taxpayer reported on his return and which was assessed by the Commissioner. The reassessment in 1952 came from the assertion that fraud had occurred which under Section 6 of the 1943 Act prevents forgiveness. This reassessment required no adjustment to income and deductions reported on the Taxpayer's 1942 return. Rather, it was based upon acceptance of the return as made.[5]

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collection of any tax shall be maintained in any court."
26 USCA 1952 ed., Sec. 3653

Section 7421(a) of the Internal Revenue Code of 1954 is substantially the same.

[5] It is here, of course, that Taxpayer argues so strenuously that if the 1952 reassessment was not an additional tax, i.e., in the

Once the case falls outside of the statutory grant of a Section 272(a) injunction, we must test it in the light of the emphatic language of Section 3653 and the limited circumstances in which, under equitable principles reflected in *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498; 76 L.ed. 422, and cases following it, injunction may nonetheless be granted. Equitable as it is in nature, the general principle defies a neat and all inclusive delineation of those circumstances which will authorize or compel injunction. But as we and many others have repeatedly pointed out, it is not enough that the tax asserted be illegal at least in the sense that it might, or will, ultimately be determined that the tax is not owing. " * * * neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a court of equity." State Railroad Tax Cases, 92 U.S. 575, 23 L.ed. 669. There must be compelling circumstances having some reasonable resemblance to traditional notions of equity which indicate persuasively that there is no other adequate remedy, and that for unusual and extraordinary circumstances and irretrievable injustice would be done were an injunction not issued.[6]

That a tax may be barred under applicable statute of

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sense of being new, then it was "old" and after six years from the original assessment (1943), it was barred in 1949 under Section 276(c), note 3, supra. Whether there is any actual inconsistency is a matter reserved for the merits not now reached.

[6] Amongst the many cases are: Steinhagen Rice Milling Co. v. Scofield, 5 Cir., 87 F.2d 804, cert. den., 300 U.S. 663, 81 L.ed. 872; Beeland Wholesale Co. v. Davis, 5 Cir., 88 F.2d 447, cert. den., 300 U.S. 680, 81 L.ed. 884; Shelton v. Allen, 5 Cir., 96 F.2d 102, cert. den., 305 U.S. 630, 83 L.ed. 404; Larson v. House, 5 Cir., 112 F.2d 930; Shambaugh v. Scofield, 5 Cir., 132 F.2d 345; Robique v. Lambert, 5 Cir., 214 F.2d 3, affirming per curiam D.C.La., 114 F.Supp. 305, cert. den., 348 U.S. 915, 99 L.ed. 718; Darnell v. Tomlinson, 5 Cir., 220 F.2d 894; Lloyd v. Patterson, 5 Cir., 242 F.2d 712.

limitations is not itself a sufficient showing.[7] Especially would that be so where, as will often be the case, whether the particular statute of limitations has run or not will depend upon a determination by an appropriate tribunal or agency of the underlying facts, not the least of which would be the existence of fraud which obliterates the bar altogether. And yet that is all we have here. The complaint itself does not purport to suggest any equitable considerations and none were shown on the trial. It was the naked claim that a requisite deficiency notice had not been given, and that for one reason or another the collection in 1953 was now barred. That was not enough. It may turn out that the Taxpayer's legal theories are correct. But there was nothing arbitrary and capricious in the tack which the Government took. A full and adequate[8] opportunity is available to test the soundness of both. To grant

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[7] Graham v. du Pont, 262 U.S. 234, 67 L.ed. 965; Bashara v. Hopkins, 5 Cir., 295 Fed. 319, cert. den., 265 U.S. 584, 68 L.ed. 1191; Cadwalader v. Sturgess, 3 Cir., 297 Fed. 73, cert. den., 265 U.S. 584, 68 L.ed. 1192; Seaman v. Bowers, 2 Cir., 297 Fed. 371; Sigman v. Reinecke, 7 Cir., 297 Fed. 1005, cert. den., 264 U.S. 597, 68 L.ed. 868; Seaman v. Guaranty Trust Co., D.C.N.Y., 1 F.2d 391; Thornhill Wagon Co. v. Noel, D.C.Va., 17 F.2d 407; Ellay Co. v. Bowers, 2 Cir., 25 F.2d 637, cert. den., 277 U.S. 606, 72 L.ed. 1012; Converse Cooperage & Yocono Co. v. Reinecke, D.C.Ill., 26 F.2d 747; Mellon v. Mertz, D.C. Cir., 82 F.2d 872, cert. den., 299 U.S. 548, 81 L.ed. 403.

[8] Taxpayer now urges that an adequate remedy by payment and suit for refund may not be available in reality as on such suit the Government will or may contend, and the Court might hold, as he insists was done in Lyddon & Co. v. United States, Court of Claims, 158 F.Supp. 951, that taxpayer should have sought an injunction. See also Maule Industries, Inc. v. Tomlinson, 5th Cir., 244 F.2d 897. If the reference in *Lyddon*, supra, at 954, to the fact that taxpayer, had he really thought a deficiency notice was required, could have sought injunction was anything more than a makeweight dicta, it is of no significance here. For here the Government has asserted that an adequate remedy does exist in the form of payment of the disputed taxes and interest and a suit for refund. If such course is followed, the Government could not, in such suit, take a contrary course, and we would not permit it if attempted.

this Taxpayer who demonstrates no appealing or necessitous circumstances the opportunity of contesting ultimate liability for taxes without following either of the traditional routes through the Tax Court or payment and suit to recover back, would not only undermine the judicial approach which acknowledges the inexorable necessities of the tax collecting process, *Snyder* v. *Marks*, 109 U.S. 189, 27 L.ed. 901, but would ultimately discriminate unfairly against countless other taxpayers and would lead to more, not less, hardship and injustices.

The injunction ought not to have issued. To avoid any doubt, we emphasize again that we have not ruled upon the merits. We hold merely that this was not a case for injunctive relief, consequently the cause must be reversed with directions to vacate the injunction and dismiss the complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

JUDGMENT

Extract from the Minutes of June 30, 1958

UNITED STATES OF AMERICA, and LAURIE W. TOMLINSON, Director of Internal Revenue of the United States for the Collection District of Florida,

No. 17002 versus

EDWARD WILLIAM CURD.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, re-

manded to the said District Court with directions to vacate the injunction and dismiss the complaint.

* * * *

ORDER DENYING REHEARING

Extract from the Minutes of August 6, 1958

UNITED STATES OF AMERICA, and LAURIE W. TOMLINSON, Director of Internal Revenue of the United States for the Collection District of Florida,

No. 17002 versus

EDWARD WILLIAM CURD.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[TITLE OMITTED]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed Dec. 6, 1957.

This cause having come on for trial on the 17th day of June, 1957, before the Court sitting without a jury, and the Court, having considered the evidence presented thereat, together with the arguments of counsel and their memoranda, does find and hold as follows:

FINDINGS OF FACT

1. On January 15, 1953, a tax assessment was made against petitioner, Edward William Curd, by the Commissioner of Internal Revenue of the United States of America, in the amount of $26,591.47 for the amount allegedly due for petitioner's 1952 income taxes.

2. An additional tax assessment for the year 1952 was made against petitioner by respondent on April 2, 1953, in the additional amount of $4,040.98, subsequent to petitioner filing an income tax return for the year 1952 indicating a tax due of about $30,000.00.

3. In April 1943, taxes were assessed by the Commissioner of Internal Revenue against petitioner for the year 1942 in the amount of $26,781.03. Payment of $13,390.52 was made by petitioner toward that amount and the remainder, the sum of $13,390.51, was credited as forgiveness upon conversion of tax to a prepayment plan. On May 29, 1953, a reassessment of the original tax was made and the previous forgiveness for the sum of $13,390.51 was disallowed on the basis of alleged fraud on the part of the petitioner. The reassessment was made in the sum of $13,390.51 plus interest in the amount of $8,235.16.

4. Warrant of distraint for the collection of the petitioner's said 1942 taxes thereof was made and issued more than six years subsequent to the initial assessment of the 1942 taxes.

5. There are no extraordinary or exceptional circumstances to enjoin the collection of the 1952 income taxes assessed against petitioner.

CONCLUSIONS OF LAW

1. The Court had jurisdiction of the parties and the subject matter herein.

2. The reassessment of the 1942 tax in the year 1953 was of the same amount as that tax originally assessed against petitioner during the year 1942. There was no showing before the Court that this original assessment was the result of fraud with intent to evade tax on the part of petitioner. In the absence of such fraud, under the provisions of 26 U.S.C. §276 (1939), collection of an income tax imposed may be made only if begun within six years after the assessment of the tax. Therefore, more than six years having elapsed, respondent should be and is enjoined from collection of that portion of the claim asserted against the petitioner for the 1942 tax.

3. The matter pertaining to the collection of the said 1952 income tax of petitioner is not cause for injunction.

DONE AND ORDERED in Chambers at Miami, Florida, this 6th day of December, 1957.

EMETT C. CHOATE
United States District Judge

[TITLE OMITTED]

FINAL DECREE ENJOINING DIRECTOR OF INTERNAL REVENUE AS TO 1942 TAXES AND DISSOLVING TEMPORARY INJUNCTION AS TO 1952 TAXES

Filed July 11, 1957.

This cause having come on for final hearing on the 17th day of June, 1957, and the Court having heard argument of counsel and having considered the evidence received at the said hearing, it is,

ORDERED AND DECREED that the Defendant, Laurie W. Tomlinson, District Director of Internal Revenue, his agents, servants, and successors in office, be and the same are hereby permanently enjoined from selling or otherwise disposing of the real and personal property of the Petitioner, Edward William Curd, to satisfy the income taxes and interest allegedly owed by the Petitioner for the year 1942 in the amount of $21,625.67, and it is,

FURTHER ORDERED AND DECREED that the Temporary Injunction entered herein on March 23, 1954, be and the same is hereby vacated and set aside only with reference to enforcement and collection of the income taxes and interest owed by the Petitioner for the year 1952 in the amount of $30,615.27.

DONE AND ORDERED in chambers at Miami, Florida, this 11th day of July, 1957.

EMMETT C. CHOATE,
United States District Judge.

Internal Revenue Code of 1939:

SEC. 271. DEFINITION OF DEFICIENCY.

(a) In general.—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (a) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

(b) Rules for Application of Subsection (a).—For the purposes of this section—

* * * *

(2) The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by this chapter was less than the excess of the amount specified in subsection (a)(1) over the amount of rebates previously made; and

(3) The computation by the collector, pursuant to section 51(f), of the tax imposed by this chapter shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) *Petition to the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in re-

spect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address.

* * * *

SEC. 276

* * * *

(c) *Collection After Assessment.*—Where the assessment of any income tax imposed by this chapter has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(26 U.S.C. 1952 ed., Sec. 276.)

SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

(26 U.S.C. 1952 ed., Sec. 3653.)

SEC. 3746. SUITS FOR RECOVERY OF ERRONEOUS REFUNDS.

(a) Refunds after Limitation Period.—Any portion of an internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of Section 3774, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Refunds Otherwise Erroneous.—Any portion of an internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 3774) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund.

(c) Refunds Based on Fraud or Misrepresentation.—Despite the provisions of subsections (a) and (b) such suit may be brought at any time within five years from the making of the refund if it appears that any part of the refund was induced by fraud or the misrepresentation of a material fact.

(d) Interest.—Erroneous refunds recoverable by suit under this section shall bear interest at the rate of 6 per centum per annum from the date of the payment of the refund.

Current Tax Payment Act of 1943, c. 120, 57 Stat. 126:

SEC. 6. RELIEF FROM DOUBLE PAYMENTS IN 1943.

(a) *Tax for 1942 Not Greater Than Tax for 1943.* In case the tax imposed by Chapter 1 of the Internal Revenue Code upon any individual (other than an estate or trust and other than an nonresident alien not subject to the provisions of sections 58, 59, and 60 of such chapter) for the taxable year 1942 (determined without regard to this section, without regard to interest or additions to the tax, and without regard to credits against the tax for amounts withheld at source)

is not greater than the tax for the taxable year 1943 similarly determined), the liability of such individual for the tax imposed by such chapter for the taxable year 1942 shall be discharged as of September 1, 1943, except that interest and additions to such tax shall be collected at the same time and in the same manner as, and as a part of, the tax under such chapter for the taxable year 1943. In such case if the tax for the taxable year 1942, (determined without regard to this section and without regard to interest or additions to the tax) is more than $50, the tax under such chapter for the taxable year 1943 shall be increased by an amount equal to 25 per centum of the tax for the taxable year 1942 (so determined) or the excess of such tax (so determined) over $50, whichever is the lesser. This subsection shall not apply in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for the taxable year 1942 or in which additions to the tax for such taxable year are applicable by reason of fraud.

(b) *Tax for 1942 Greater Than Tax for 1943.*— In case the tax imposed by Chapter 1 of the Internal Revenue Code upon any individual (other than an estate or trust and other than a nonresident alien not subject to the provisions of sections 58, 59, and 60 of such chapter) for the taxable year 1942 (determined without regard to this section, without regard to interest or additions to the tax, and without regard to credits against the tax for amounts withheld at source) is greater than the tax for the taxable year 1943 (similarly determined), the liability of such individual for the tax imposed by such chapter for the taxable year 1942 shall be discharged as of September 1, 1943, except that interest and additions to such tax shall be collected at the same time and in the same manner as, and as a part of, the tax under such chapter for the taxable year 1943. In such case the tax under such chapter for the taxable year 1943 shall be increased by—

(1) The amount by which the tax imposed by such chapter for the taxable year 1942 (determined without regard to this section and without

regard to interest and additions to such tax) exceeds the tax imposed by such chapter for the taxable year 1943 (determined without regard to this section, without regard to interest and additions to such tax, and without regard to credits against such tax under section 466 (e) or under section 35 of such chapter), plus

(2) if the tax for the taxable year 1943 (determined without regard to this section, without regard to interest or additions to tax, and without regard to credits against such tax under section 466 (e) or under section 35 of such chapter) is more than $50, an amount equal to 25 per centum of the tax for the taxable year 1943 (so determined) or the excess of such tax (so determined) over $50, whichever is the lesser. Such amount shall in no case exceed 25 per centum of the tax for the taxable year 1942 (determined without regard to this section and without regard to interest and additions to such tax) or the excess of such tax (so determined) over $50, whichever is the lesser.

This subsection shall not apply in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for the taxable year 1942 or in which additions to the tax for such taxable year are applicable by reason of fraud. An individual who becomes subject to tax for the taxable year 1943 under this subsection shall be an individual required to make a return for the taxable year 1943 under section 51 of the Internal Revenue Code.

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FILED
DEC 1 1958
JAMES R. BROWNING, Clerk

No. 668

In the Supreme Court of the United States

OCTOBER TERM, 1958

EDWARD WILLIAM CUNO, PETITIONER

v.

UNITED STATES OF AMERICA, and LAURIE W. TOMLINSON, DIRECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE COLLECTION DISTRICT OF FLORIDA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
I. HENRY KUTZ,
FRED E. YOUNGMAN,
Attorneys,
Department of Justice,
Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 486

EDWARD WILLIAM CURD, PETITIONER

v.

UNITED STATES OF AMERICA, and LAURIE W. TOMLINSON, DIRECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE COLLECTION DISTRICT OF FLORIDA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 20-27) is reported at 257 F. 2d 347. The District Court did not enter a written opinion. Its findings of fact and conclusions of law (R. 91-93; Pet. 28-30) are not reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 27-28) was entered June 30, 1958. A petition for rehearing

was denied on August 6, 1958. (Pet. 28.) The petition for a writ of certiorari was filed on October 31, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether, under the facts of this case and in view of the provisions of Section 3653(a) of the Internal Revenue Code of 1939, the court below erred in holding that the District Court should not have granted an injunction permanently restraining the District Director of Internal Revenue from selling or otherwise disposing of taxpayer's property to satisfy unpaid 1942 income taxes and interest.

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 12-18.

STATEMENT

This action was brought by Edward William Curd (the taxpayer) in the District Court for the Southern District of Florida (Br. App. B 42-48)[1] to enjoin

[1] As indicated hereafter, there were two appeals to the Court of Appeals in the instant case. The record on the first appeal was printed, and was before that court for consideration in connection with the first appeal, but was inadvertently omitted from the record certified to the Court of Appeals on the second appeal. Accordingly, for convenience of the court on the second appeal, counsel for the Government reproduced as Appendix B to its brief the original petition for injunction, order of March 23, 1954, granting a temporary injunction, and order of April 28, 1954, dismissing the petition for injunction (which had been included in the printed record

the collection of income taxes assessed against him for 1942 and 1952 on the ground that assessments of such taxes were jeopardy assessments under Section 273(a) of the Internal Revenue Code of 1939, and that the Commissioner of Internal Revenue had not mailed him a statutory notice of deficiency under Section 272(a) of the 1939 Code as required by Section 273(b). The petition for an injunction was denied by an order entered by the District Court on April 28, 1954 (Br. App. B 50-51), before the United States or the Director had filed an answer or other pleading, and the taxpayer appealed to the Court of Appeals for the Fifth Circuit, where the parties stipulated for remand of the case (Br. App. B 52-53) to permit the Government to file an answer or otherwise plead. Upon remand, the Government moved to set aside a temporary restraining order (Br. App. B 49-50) entered March 23, 1954, and filed an answer (R. 4-7), praying that the petition for an injunction be dismissed for lack of jurisdiction. The taxpayer filed a reply (R. 9-11) raising the statute of limitations as an additional ground for injunctive relief for the year 1942. By a final decree entered July 11, 1957 (R. 21), the District Court permanently enjoined the District Director, and his agents and successors in office, from disposing of property of the taxpayer for the payment of taxes and interest assessed against him for 1942, and vacated the tem-

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on the first appeal), together with the stipulation for remand and order of remand (which were a part of the Court of Appeals record in the case). These documents will be referred to in this brief as "Br. App. B —".

porary restraining order as to 1952. Findings of fact and conclusions of law filed on December 6, 1957 (R. 91-93; Pet. 28-30), disclose that collection of the 1942 assessment was enjoined on the ground that collection was barred by the statute of limitations. The Court of Appeals reversed (Pet. 20-27), holding that the amount of 1942 tax involved did not constitute a "deficiency" within the meaning of Section 271(a) of the 1939 Code, collection of which could be enjoined under Section 272(a) in the absence of issuance of a statutory notice of deficiency, and that the alleged bar of the statute of limitations, in the absence of any other showing of exceptional and unusual circumstances, did not constitute grounds for general equitable relief.

The facts are not in dispute. On or about March 15, 1943, the taxpayer filed his individual income tax return for 1942 with the Collector in Kentucky, reporting income tax due for that year in the sum of $26,781.03. This was assessed on the Commissioner's list in April, 1943. Payments aggregating $13,390.52 were made by the taxpayer on this reported liability in two equal installments in 1943. The unpaid balance of $13,390.51 was recorded on the books of the Collector as discharged pursuant to the tax forgiveness provisions of Section 6 of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, and the amount previously paid on the 1942 assessment was credited to the taxpayer's 1943 liability in accordance with that section. (Pet. 20-21.)

In 1952, deficiencies were determined against the taxpayer for all the years from 1941 through 1951,

and 50% fraud penalties were added under Section 293(b) of the 1939 Code. The taxpayer did not dispute the Commissioner's determination, but on July 31, 1952, within two days after they were assessed, the taxpayer paid these additional taxes, together with penalties and interest, aggregating approximately $260,000, and departed for Canada where he continues to live. Meanwhile, the Government has indicted him for income tax evasion for some of those years. (Pet. 21.)

Included in the sum paid on July 31, 1952, were additional income taxes, fraud penalties, and interest for the year 1942 in the respective amounts of $5,920.67, $2,960.34, and $3,329.20. Treating the payment of these sums as a determination that fraud had occurred, the Commissioner determined in the year 1942 that the taxpayer was not entitled to the benefit of the so-called forgiveness provisions of Section 6 of the 1943 Act, and on May 29, 1953, he reassessed the unpaid balance of tax ($13,390.51) shown on the taxpayer's 1942 return, plus interest thereon to April, 1953, in the amount of $8,235.16. This assessment, together with others not here involved, was transferred to the District Director's office at Jacksonville, Florida, where the distraint was issued and the property advertised for sale before this action was begun. (Pet. 21-22.)

ARGUMENT

1. The first reason advanced by the taxpayer for granting a writ of certiorari in this case is that collection of the uncollected portion of his reported tax

liability for 1942, assessed in April, 1943, is "clearly without any color of right or semblance of legality" (Pet. 6) because barred by the six-year period for collection after assessment provided by Section 276 (c) of the 1939 Code (Appendix, *infra*, p. 14). This ground for equitable relief was properly rejected by the Court of Appeals (Pet. 25-26). The court correctly pointed out that in view of the emphatic language of Section 3653(a) of the 1939 Code (Appendix, *infra*, p. 15), and under the limited circumstances whereby injunctive relief may nonetheless be granted, the bar of the statute of limitations is not of itself sufficient to justify injunctive relief. As the court indicated, there must be compelling circumstances having some reasonable resemblance to traditional notions of equity which indicate persuasively that there is no other adequate remedy, and that because of exceptional and extraordinary circumstances irretrievable injustice would be done were an injunction not issued.[2] The Court of Appeals correctly noted that such exceptional and extraordinary circumstances are not shown by the record in this case (Pet. 26). For that reason there is no merit to the suggested conflict (Pet. 9-10) with the decision of the Court of Appeals for the Second Circuit in *National Foundry Co. of N.Y.* v. *Director of Int. Rev.*, 229 F. 2d 149.

Moreover, in rejecting the bar of the statute of limitations as grounds for equitable relief in this

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[2] See cases cited in footnotes 6 and 7 of the opinion of the Court of Appeals. (Pet. 25, 26.)

case, the Court of Appeals properly emphasized that it was not passing upon the merits of the statute of limitations issue because the taxpayer has an adequate legal remedy for testing the issue. (Pet. 26-27.)

2. Taxpayer's second suggested ground for granting certiorari, i.e., that the District Director's proceeding for collection was invalid because the Commissioner had not issued any 90-day deficiency notice with respect to the tax involved (Pet. 10), is equally without merit. Failure to issue a statutory deficiency notice may be made the basis of an action under Section 272(a) of the 1939 Code (Appendix, *infra*, p. 13) to enjoin the collection of a "deficiency" in tax, as defined in Section 271(a) of the 1939 Code, over which the Tax Court would have jurisdiction. However, as the Court of Appeals pointed out (Pet. 24), the tax involved in this proceeding was not an additional tax, but was a part of the original tax reported on the taxpayer's 1942 return. Accordingly, relief may not be granted under Section 272(a).

Taxpayer seeks to bring the amount here involved under the statutory definition of a "deficiency" by reference to subsections (b)(2) and (b)(3) of Section 271 of the 1939 Code (Pet. 12-13), and by characterizing it as an amount previously rebated (Pet. 14-15). So far as the question of whether or not a deficiency existed here involves a construction of the Current Tax Payment Act, no issue of public importance is raised. The cited statute refers to taxes for 1942 and 1943 and possesses no present general importance.

Moreover, taxpayer's contention completely overlooks the real character of the amount involved. It is the product of statutory enactment and not the consequence of any tax adjustment by the Commissioner. The taxpayer duly filed his 1942 return, reporting a tax liability of $26,781.03, which was due and payable in quarterly installments during 1943 under the law then in effect. After the taxpayer had made payment of two quarterly installments in 1943, Congress enacted the Current Tax Payment Act of 1943, converting our tax reporting and paying procedures into a so-called pay-as-you-go system. To ease the burden of double taxation for the year of transition, Congress provided in Section 6 of that Act (Appendix, *infra*, p. 16) for cancellation of the 1942 liability, except in cases of fraud, and permitted the crediting of amounts already paid on 1942 liabilities to 1943 liabilities. The liability was self-assessed and became due when the return was filed. The return here being fraudulent, the liability was not discharged or cancelled upon the enactment of Section 6 of the 1943 Act and continued as a self assessed liability.[3] The liability was not "abated" within the meaning of Section 271(b) of the 1939 Code by the formality of entering the unpaid amount on the Collector's books as discharged under Section 6 of the 1943 Act. Accordingly, reversing the entry

[3] Even if the burden would be upon the Commissioner to prove fraud in the event the taxpayer should sue for refund of the tax, there is no requirement that he prove fraud before collecting the tax.

on the Collector's books did not constitute a determination of a deficiency within the meaning of the statute. In this respect this case differs from *Austin Co.* v. *Commissioner*, 35 F. 2d. 910, (C.A. 6th), and *Levy* v. *Commissioner*, 48 F. 2d 725 (C.A. 9th), cited as in conflict (Pet. 14), in which the prior reduction in reported tax liability was based upon the administrative determination of the Commissioner.

Jamison v. *Repetti*, 239 F. 2d 901 (C.A. 9th), also cited as in conflict (Pet. 14), presents an entirely different situation from that involved here. In that case the taxpayer filed delinquent returns covering a number of years, claiming as a credit against taxes reported on some of the delinquent returns an amount overpaid as estimated tax in an earlier year. The District Director, contending that refund or credit of the earlier overpayment was barred by the statute of limitations, denied the credit and sought to collect the amount of taxes against which the credit had been claimed.

Nor is there any merit to the suggestion (Pet. 16) that the assessment of May 29, 1952, may be regarded as a "penalty" assessment. The amount reported on a taxpayer's return as tax is not, under any authority which has come to our attention, treated as a penalty. Moreover, the amount here involved has not been treated as a penalty for purposes of collection, and there is no basis for taxpayer's assertion of conflict (Pet. 16-17) with numerous cases involving assessable penalties.

In this connection, taxpayer is in error in asserting (Pet. 17) that he has never had an opportunity

to defend himself against any charge of fraud in connection with the assessment of $13,390.51 for 1942 because no notice of deficiency was mailed to him. In 1952 the Commissioner asserted deficiencies in income tax against the taxpayer for all years 1941 through 1951, including 1942, to which he added 50% fraud penalties and interest. On July 31, 1952, the taxpayer voluntarily paid all such deficiencies, together with the fraud penalties and interest, aggregating approximately $260,000, and did not seek review in the Tax Court. If the taxpayer had appealed to the Tax Court from the Commissioner's determination of fraud, and the determination of fraud had been sustained, the denial of relief under Section 6 of the 1943 Act would have followed automatically. See *Cohen* v. *Commissioner*, 9 T.C. 1156, 1167, affirmed, 176 F. 2d 394 (C.A. 10th); *Reimer's Estate* v. *Commissioner*, 180 F. 2d 159 (C.A. 6th), affirming 12 T.C. 913; *Arlette Coat Co.* v. *Commissioner*, 14 T.C. 751; *Kilpatrick* v. *Commissioner*, 22 T.C. 446, 458-459, affirmed, 227 F. 2d 240 (C.A. 5th); *Estate of Stein* v. *Commissioner*, 25 T.C. 940, 962-963.

Taxpayer's final suggestion (Pet. 18) that the decision below is in conflict with the decision of the Court of Claims in *Lyddon & Co.* v. *United States*, 158 F. Supp. 951, is likewise without merit, and was fully answered by the Court of Appeals. (Pet. 26, fn. 8; 27.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

I. HENRY KUTZ,
FRED E. YOUNGMAN,
Attorneys.

DECEMBER, 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 271. DEFINITION OF DEFICIENCY.

(a) *In general.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made.

(b) *Rules for application of subsection (a).*—For the purposes of this section—

(1) The tax imposed by this chapter and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 35, and without regard to so much of the credit under section 32 as exceeds 2 per centum of the interest on obligations described in section 143 (a);

(2) The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by this chapter was less than the excess of the amount specified in subsection (a) (1) over the amount of rebates previously made; and

(3) The computation by the collector, pursuant to section 51 (f), of the tax imposed by

this chapter shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

(26 U. S. C. 1952 ed., Sec. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) *Petition to the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petion with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceed in court for its collection shall be made, beg or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been noti-

fied by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address.

* * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 273. JEOPARDY ASSESSMENTS.

(a) *Authority for Making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) *Deficiency Letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

* * * *

(26 U.S.C. 1952 ed., Sec. 273.)

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment

for the collection of such taxes shall be begun after the expiration of such period.

* * * *

(26 U.S.C. 1952 ed., Sec. 275.)

SEC. 276. SAME—EXCEPTIONS.

(a) *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * *

(c) *Collection After Assessment.*—Where the assessment of any income tax imposed by this chapter has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(26 U.S.C. 1952 ed., Sec. 276.)

SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.*

(a) *Tax.*—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the

* Section 7421(a) of the Internal Revenue Code of 1954 is substantially the same.

purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * *

(26 U.S.C. 1952 ed., Sec. 3653)

Current Tax Payment Act of 1943, c. 120, 57 Stat. 126:

SEC. 6. RELIEF FROM DOUBLE PAYMENTS IN 1943.

(a) *Tax for 1942 Not Greater Than Tax for 1943.*—In case the tax imposed by Chapter 1 of the Internal Revenue Code upon any individual (other than an estate or trust and other than a nonresident alien not subject to the provisions of sections 58, 59, and 60 of such chapter) for the taxable year 1942 (determined without regard to this section, without regard to interest or additions to the tax, and without regard to credits against the tax for amounts withheld at source) is not greater than the tax for the taxable year 1943 (similarly determined), the liability of such individual for the tax imposed by such chapter for the taxable year 1942 shall be discharged as of September 1, 1943, except that interest and additions to such tax shall be collected at the same time and in the same manner as, and as a part of, the tax under such chapter for the taxable year 1943. In such case if the tax for the taxable year 1942 (determined without regard to this section and without regard to interest or additions to the tax) is more than $50, the tax under such chapter for the taxable year 1943 shall be increased by an amount equal to 25 per centum of the tax for the taxable year 1942 (so determined) or the excess of such tax

(so determined) over $50, whichever is the lesser. This subsection shall not apply in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for the taxable year 1942 or in which additions to the tax for such taxable year are applicable by reason of fraud.

(b) *Tax for 1942 Greater Than Tax for 1943.*—In case the tax imposed by Chapter 1 of the Internal Revenue Code upon any individual (other than an estate or trust and other than a nonresident alien not subject to the provisions of sections 58, 59, and 60 of such chapter) for the taxable year 1942 (determined without regard to this section, without regard to interest or additions to the tax, and without regard to credits against the tax for amounts withheld at source) is greater than the tax for the taxable year 1943 (similarly determined), the liability of such individual for the tax imposed by such chapter for the taxable year 1942 shall be discharged as of September 1, 1943, except that interest and additions to such tax shall be collected at the same time and in the same manner as, and as a part of, the tax under such chapter for the taxable year 1943. In such case the tax under such chapter for the taxable year 1943 shall be increased by—

(1) The amount by which the tax imposed by such chapter for the taxable year 1942 (determined without regard to this section and without regard to interest and additions to such tax) exceeds the tax imposed by such chapter for the taxable year 1943 (determined without regard to this section, without regard to interest and addi-

tions to such tax, and without regard to credits against such tax under section 466 (e) or under section 35 of such chapter), plus

(2) if the tax for the taxable year 1943 (determined without regard to this section, without regard to interest or additions to the tax, and without regard to credits against such tax under section 466 (e) or under section 35 of such chapter) is more than $50, an amount equal to 25 per centum of the tax for the taxable year 1943 (so determined) or the excess of such tax (so determined) over $50, whichever is the lesser. Such amount shall in no case exceed 25 per centum of the tax for the taxable year 1942 (determined without regard to this section and without regard to interest and additions to such tax) or the excess of such tax (so determined) over $50, whichever is the lesser.

This subsection shall not apply in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for the taxable year 1942 or in which additions to the tax for such taxable year are applicable by reason of fraud. An individual who becomes subject to tax for the taxable year 1943 under this subsection shall be an individual required to make a return for the taxable year 1943 under section 51 of the Internal Revenue Code.

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